USURY — NATURE AND VALIDITY OF USURIOUS CONTRACTS — GUARANTEE TO LENDER OF RISE IN VALUE OF STOCKS SOLD TO MAKE LOAN. — In return for a loan by the plaintiff the defendant agreed to repay the amount advanced with interest, the cost to the plaintiff of selling stock to procure the money loaned, and the rise in value of and dividends on the stock during the period of the loan. *Held*, that this does not constitute usury. *De Moltke-Huitfeldt* v. *Garner*, 145 N. Y. App. Div. 766, 130 N. Y. Supp. 558.

A lender may be compensated for his services or expenses in raising the money for the loan in addition to interest. *Thurston* v. *Cornell*, 38 N. Y. 281; *Kihlholz* v. *Wolf*, 103 Ill. 362. A contract guaranteeing to the lender the rise in value of stock sold to make the loan, without hazarding the sum advanced and interest, has been held usurious. *White* v. *Wright*, 3 B. & C. 273. A contrary result reached by the Massachusetts court was based on the ground that the contract contemplated two acts, the loan and the preliminary act of selling the stock, and that this preliminary act was consideration for the payment of the rise in value of the stock. *Snow* v. *Nye*, 106 Mass. 413. But in practically all cases the lender either disposes of property or foregoes an investment to make the loan. By a fair construction of the usury statute such a detriment is incident to and included in the transaction termed a loan. So it has been held that a lender cannot charge for the sacrifice he has made in selling securities to make the loan. *Van Tassell* v. *Wood*, 12 Hun (N. Y.) 388. The result reached by the principal case would seem to violate the spirit and lessen the effectiveness of the statute.

BOOK REVIEWS.

A TREATISE ON THE MODERN LAW OF EVIDENCE. By Charles Frederick Chamberlayne. Volumes 1 and 2. Albany: Matthew Bender & Company; London: Sweet & Maxwell. 1911. pp. cxxii, xxviii, 2328.

These two volumes are the first instalment of a larger work. The first volume, entitled "Administration," contains introductory matter, and deals with Law and Fact, the function of the Court and Jury, general principles governing Judicial Administration, and Judicial Notice. The latter subject is divided into "Judicial Knowledge" and "Common Knowledge," and a chapter on "Special Knowledge" follows. The second volume, which is entitled "Procedure," includes the Burden of Proof, Presumptions, Admissions, Confessions, and Former Evidence. The terms "Procedure" and "Administration" are used to mark the distinction between "judicial action controlled by rule and action not so controlled," and this distinction is much insisted on throughout the book. Mr. Salmond's criticism of the law of evidence — a criticism with a special point for this country beyond what its author can well have realized — is quoted with approval:

> "No unprejudiced observer can be blind to the excessive credit and importance attached in judicial procedure to the *minutiæ* of the law of evidence. This is one of the last refuges of legal formalism. Nowhere is the contrast more striking between the law's confidence in itself and its distrust of the judicial intelligence. The fault is to be remedied not by the abolition of all rules for the measurement of evidential value, but by their reduction from the position of rigid and peremptory to that of flexible and conditional rules. Most of them have their source in good sense and practical experience, and they are profitable for the guidance of individual discretion, though mischievous as substitutes for it."

And the advantage of flexible and rational methods as against the "rigidity of procedural law" is constantly urged. There are many acute and vigorous

comments on the extremes to which our system has gone in tying the hands of the trial judge and treating the law of evidence as a body of minute rules to bind him instead of general principles to guide his judgment, and the attacks on the anachronisms and absurdities of our criminal procedure are particularly refreshing. Altogether Mr. Chamberlayne has made a timely and valuable contribution to the cause of procedural reform.

The wide reading and long reflection which are shown in Mr. Chamberlayne's outlook on his subject as a whole, and in his understanding of its growth and tendencies, appear also in his treatment of Presumptions. He deals with this subject fully in four chapters entitled: "Inferences of Fact," "Presumptions of Law," "Pseudo-Presumptions," and "Administrative Assumptions," and his careful discriminations will help to clear up a tangled and difficult head of the law.

When we turn from the general design of the work to its execution some criticisms suggest themselves. Its bulk is especially to be regretted in a book with so practical a purpose. In his preface Mr. Chamberlayne says:

"Another concession to this necessity for extreme economy in the use of time has been a reluctant indulgence in repetition and the employment of a high degree of condensation."

Whatever may be the compatibility of these two aims in the nature of things, certain it is that in the present instance the former has not been sacrificed to the latter. Mr. Chamberlayne himself confesses to "an amount of repetition which would scarcely be justified in any work which might fairly be expected to be more continuously read or examined at greater leisure." And it leads to other difficulties than mere bulk. The reader, for example, turns with some perplexity from this passage in section 1294 (in support of which Tilley *v.* Damon, 11 Cush. 247, might have been cited):

"A distinction should, upon principle, be drawn between the admission obtained by the use of *duress*, where the will is overpowered or controlled and cases in which the judgment has been misled, by falsifying motives while the will has been left free. The first class of statements are, strictly speaking, involuntary, not the act of the speaker, and should be peremptorily rejected as irrelevant,"

to this in section 1560:

"No rule of exclusion exists or has been suggested as valuable in civil causes. In such cases the admission obtained by duress is admitted in the first instance. The statement is submitted to the jury although the effect of such duress as was inflicted was increased by the fact that the declarant was under arrest or in prison at the time."

It turns out too from the table of contents that topics as important as Writings and Witnesses will not be included in the four large volumes which we had supposed from the announcements would treat the law of evidence comprehensively. Footnotes indicate that these subjects are to be dealt with hereafter; and if the method of their treatment is no less discursive than that now employed we may look forward to something more than a fifth volume. "Common Knowledge" and "Special Knowledge," for instance, are classified according to various forms of human activity — facts of "human experience," "social life," "history," "business" and the like, with further subdivisions such as "carpentering," "chemistry," and "engineering matters"; and we find not less than twenty-two pages allotted to such common knowledge as concerns itself with intoxicating liquors.

Mr. Chamberlayne's terminology also contains matter for serious reflection. In his introduction he says:

"The most obvious suggestion in entering upon the task of definition would be that of coining a novel nomenclature to which a definite scientific meaning could be once for all attached. So inviting a short-cut to precision must reluctantly be disregarded. As Pollock and Maitland (2 Hist. Eng. Law, p. 30) say: 'The license that the man of

science can allow himself of coining new words, is one which by the nature of the case is denied to lawyers.'"

No doubt the coiner of new words exposes himself to the reproach of strangeness and pedantry, but at least he purchases accuracy and consistency at the price. The evils of his method at their worst can hardly match those which must follow from deliberately adopting so discredited and discreditable a phrase as *res gestæ* for an important part of his analysis. Mr. Chamberlayne has done this with his eyes open. He concedes that the term, while presenting an "appearance of learned exactness," is "notoriously" and "seductively" ambiguous (p. cxxi, § 47), "extremely versatile and elusive" (§ 48), and "of protean meaning" (p. lxxxv), and he even seems to admit that it is "entirely superfluous and principally used at the present time on account of its convenient obscurity" (§ 1026). Its adoption is the less to be excused in one who recognizes (p. cxvi) the importance to clearness of thought of a good terminology. Some of the resulting evils are already to be seen in the unfruitful discriminations between "component," "constituent," and "*res gestæ*" facts, and in the suggestion that for some reason "*res gestæ* facts" are not the subject of judicial knowledge (§§ 700, 714 n. 8, 867). For the hearsay exception which has been afflicted with this name we must await with some apprehension a later volume.

A like criticism, though in a lesser degree, may be made of the terms "administration" and "procedure," the meanings of which are confessedly fixed in a "somewhat arbitrary manner" (p. cxvi). In favor of "administration" it may be said that the more familiar "discretion" is burdened with associations which impair its usefulness for Mr. Chamberlayne's excellent propaganda. But we nevertheless find ourselves involved in uncomfortable double meanings of "procedure" which might have given the author more concern but for his disposition (§§ 167–171) to undervalue the distinction between rights and remedies. And the assumption that "procedure" imports rigidity is not happy in so enlightened an advocate of procedural flexibility.

A habit of statement so cautious that the margin of safety is sometimes excessive ("It *has been said to be* error for the presiding justice to leave such a preliminary question [of fact] to the jury," § 83. "Probative writings *may well be* construed by the judge as matter of law. Thus a judge *will be justified in not leaving* the construction of a letter to the jury," § 130) has not saved Mr. Chamberlayne from the inaccuracies which so large a work naturally involves. In section 75, for example, Massachusetts is cited among states which have authorized juries, by judicial decision, "to invent or improvise a rule of law for themselves in criminal cases." In section 154 it is said that in Massachusetts the determination of foreign law as a question of fact "has been added to the province of the court . . . by judicial decision" — a statement not only unwarranted by the cases cited to support it, but conspicuously inconsistent with Electric Welding Co. *v.* Prince, 200 Mass. 386. In section 382, York *v.* Pease, 2 Gray 282, is cited in support of the rather surprising proposition that

"where rebuttal has been anticipated, as on the examination of the actor's witness, the subject may still be resumed, as a matter of right, upon rebuttal."

And in section 203, note 13, the case of United States *v.* Coolidge, decided in 1815, has led the author to say that "in Massachusetts a witness is not allowed to affirm merely because he prefers to do so. The privilege is strictly limited to Quakers," — a proposition which must be taken as of a period antedating Mass. Stat. 1824, c. 91.

Mr. Chamberlayne's matter is conveniently and attractively arranged for practical use, and an admirable index to the two volumes calls for special praise. The lack of a table of cases will of course be met in a later volume.

E. R. T.